Supreme Court, U.S.
FILED

(1) 952009 JUN 1 8 1996

OFFICE OF THE CLERK

No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ROGER W. PIPKIN, III,
Petitioner,
v.
MORTGAGE CREDITCORP, INC., WESTMARK MORTGAGE CORPORATION, MIDLAND MORTGAGE CO., MIDFIRST BANK S.S.B., NORTHWEST BANK,
Respondents,
v.
GOVERNMENT NATIONAL MORTGAGE ASSOCIATION,
Third-Party Defendant, Respondent.

Petition For A Writ of Certiorari To The United States Court Of Appeals ForThe Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM E. KING
Attorney of Record
P.O. Box 309
Kemah, TX 77565

Co-Counsel:

ANTHONY W. NIMS
1909 Branard
Houston, TX 77098
MARGARET M. McCLURE
909 Fannin, Suite 3005
Houston, TX 77010

39 pp

QUESTION PRESENTED

This case involves the rights of a judgment creditor to enforce a judgment against certain real estate mortgages which, according to the real property records of the jurisdiction in which the property is located, are owned by the judgment debtor, when the Government National Mortgage Association claims ownership by an unrecorded assignment of the mortgages, and whether the applicable federal law preempts the state real property recording statutes. The question presented is:

I. Does 12 U.S.C. § 1721(g), part of the enabling statute of the Government National Mortgage Association (GNMA), preempt Texas Property Code § 13.001(a), and thereby exempt GNMA from recording in the public real estate records conveyances of real property interests and allow GNMA to deprive a judgment creditor of its right to execute against those real property interests by reason of the unrecorded conveyances, even though state law provides that such unrecorded conveyances are void as to the judgment creditor.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

CITATION TO THE OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

HOW THE QUESTIONS PRESENTED WERE DECIDED BELOW 4

REASONS WHY THE WRIT SHOULD BE GRANTED 4

I. THE EXPRESS LANGUAGE OF 12 U.S.C. § 1721(g) SHOULD NOT BE CONSTRUED TO PREEMPT TEXAS PROPERTY CODE § 13.001(a). 5

CONCLUSION 11

APPENDIX A. 1a

APPENDIX B. 13a

APPENDIX C. 15a

TABLE OF AUTHORITIES

CASES **PAGE**

Cippolone v. Liggett Group, Inc.
505 U.S. 504, 112 S.Ct. 2608, 2618 (1992) 6

DRG Funding Corp. v. Secretary of Housing and Urban Development
1988 WL 90107, at 5 (D.D.C. 1988) 9

English v. General Electric Co.
496 U.S. 72, 110 S.Ct. 2270 (1990) 6

Freightliner Corp. V. Myrick
___ U.S. ___ , 115 S.Ct. 1483, 1488 (1995) 7

Gade v. National Solid Wastes Management Association
505 U.S. 88, 112 S.Ct. 2374 (1972) 5

Gibraltar Savings Association v. Martin
784 S.W.2d 555, 557 (Tex. App--Amarillo, 1990, writ denied) 5

Hillsborough County, Florida v. Automated Medical Laboratories, Inc.
471 U.S. 707, 105 S.Ct. 2371, 2376 (1985) 6

Huron Portland Cement Co. V. Detroit
362 U.S. 440, 80 S.Ct. 813 (1960) 6

Morales v. Trans World Airlines, Inc.
504 U.S. 374, 112 S.Ct. 2031 (1992) 5

Rice v. Sante Fe Elevator Corp.
331 U.S. 218, 67 S.Ct. 1146, 1152 (1947) 6

STATUTES

12 U.S.C. § 1721(g) . . . . . i, 2, 4, 5, 7

Texas Property Code § 13.001(a) . . . . . i, 2-5, 8

Petitioner, Roger W. Pipkin, III, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

CITATION TO THE OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is unpublished, but was issued December 18, 1995, under Cause No. 94-6443, and is attached to this petition as Appendix A. The order denying rehearing was filed March 14, 1996, and is attached as Appendix B. The appeal to the Court of Appeals was from the Order and Judgment, filed November 9, 1994, by the United States District Court for the Western District of Oklahoma, attached hereto as Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was issued on December 18, 1995, and rehearing was denied on March 14, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves:

1. U.S. Const. Art. VI, Clause 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. 12 U.S.C § 1721(g), which provides in pertinent part:

> The Association is hereby empowered, in connection with any guaranty under this subsection, whether before or after any default, to provide by contract with the issuer for the extinguishment, upon default by the issuer, of any redemption, equitable, legal or other right, title, or interest of the issuer in any mortgage or mortgages constituting the trust or pool against which the guaranteed securities are issued; and with respect to any issue of guaranteed securities, in the event of default and pursuant otherwise to the terms of the contract, the mortgages that constitute such trust or pool shall become the absolute property of the Association, subject only to the unsatisfied rights of the holders of the securities based on and backed by such trust or pool. No state or local law, and no federal law (except Federal law enacted expressly in limitation of this subsection after October 8, 1980) shall preclude or limit the exercise by the Association of (A) its power to contract with the issuer on the terms stated in the preceding sentence, (B) its rights to enforce any such contract with the issuer, or (C) its ownership rights as provided in the preceding sentence, in the mortgages constituting the trust or pool against which the guaranteed securities are issued.

3. Texas Property Code § 13001(a) which provides:

> A conveyance of real property or an interest in real property or a mortgage or deed of trust is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record as required by law.

STATEMENT OF THE CASE

Roger W. Pipkin, III obtained a judgment in the amount of $4,875,478, plus interest, against Mortgage Creditcorp, Inc. and Westmark Mortgage Corporation from the District Court of Harris County, Texas, on April 6, 1994. By searching the applicable real property records, Pipkin then learned of real property mortgages secured by interests in real property located in Texas in favor of the judgment debtors. By searching other records, Pipkin learned that Midland Mortgage Co., Midfirst Bank S.S.B. and Northwest Bank (all located in Oklahoma) held possession of the mortgages that were owned, at least in so far as the real property records reflected, by the judgment debtors.

Learning that these parties in Oklahoma held property of the judgment debtors, Pipkin filed his judgment in Oklahoma and sought a writ of execution from the appropriate state court, the District Court of Oklahoma County, Oklahoma. He caused the execution papers to be issued and served on the Oklahoma holders of the property. These Oklahoma holders filed a petition in intervention and joined the Government National Mortgage Association (GNMA) as a third party defendant. GNMA then removed the action to the United States District Court for the Western District of Oklahoma.

GNMA asserted its ownership of the mortgages, claiming that the mortgages had been assigned to it by the judgment debtors by virtue of unrecorded assignments. Since the mortgages were secured by Texas real property, Texas law controlled, and Pipkin asserted that Texas Property Code § 13.001(a) specified that any unrecorded assignments were void as against him. GNMA in turn asserted that this section of the Texas Property Code was preempted by a federal

statute, 12 U.S.C. § 1721(g), and that GNMA therefore had no obligation to file conveyances of real property interests in the real property records.

HOW THE QUESTION PRESENTED WAS DECIDED BELOW

GNMA filed a motion for summary judgment and a motion to quash and dismiss execution proceedings before the United States District Court. The District Court granted both motions, holding that 12 U.S.C. § 1721(g) expressly preempted Texas Property Code § 13.001(a). On appeal to the United States Court of Appeals for the Tenth Circuit, the Court affirmed, agreeing that the federal statute expressly preempted the state statute.

REASONS WHY THE WRIT SHOULD BE GRANTED

This Court should review the determination of the United States Court of Appeals for three reasons:

(1) The decision of the Court of Appeals incorrectly construes the meaning of 12 U.S.C. § 1721(g) when it holds that this section expressly preempts the Texas recording statute;

(2) The decision of the Court of Appeals conflicts with relevant decisions of this Court, which hold that (a) there is a presumption against preemption of the valid exercise of a state's police power, and, thus, any federal law which is asserted to preempt such a state law must be strictly, and narrowly, construed; and (b) preemption should not be found where there is no irreconcilable conflict between the state and federal law; and

(3) The decision of the Court of Appeals decides an important question of federal law that should be determined by this Court when it holds that GNMA is exempt from all state recordation statutes, thereby destroying the ability of all other persons to rely upon the validity of the local real property records.

I. THE EXPRESS LANGUAGE OF 12 U.S.C. § 1721(g) SHOULD NOT BE CONSTRUED TO PREEMPT TEXAS PROPERTY CODE § 13.001(a).

The question whether a certain state law is preempted by a federal law is one of congressional intent. *Gade v. National Solid Wastes Management Association*, 505 U.S. 88, 112 S.Ct. 2374 (1972). Stated another way, the question is one of statutory intent, and the examination must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S.Ct. 2031 (1992). However, before the Court can begin the task of statutory construction, certain rules affecting the construction must be considered.

In this case, the Court must consider the presumption against preemption. Obviously, state law has always controlled questions of real property conveyances within the jurisdiction of the state and the question of priority among competing lien claimants to the same assets. There can hardly be an area of law that is more traditionally occupied by the state than that area involved in the Texas recordation statute. In fact, the Texas courts have said of the state statute at issue that "(t)his statute ... has been a part of our jurisprudence since before Texas was a state." *Gibraltar Savings Association v. Martin*, 784 S.W.2d 555, 557 (Tex.

App--Amarillo, 1990, writ denied). Where the area of law is one that has generally been occupied by the state, this Court has said:

> Congress legislated here in a field which the States have traditionally occupied. (*Citations omitted*). So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 67 S.Ct. 1146, 1152 (1947). Cf. *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 105 S.Ct. 2371, 2376 (1985) (presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause); *Cippolone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 2618 (1992) (must construe the federal statute in light of the presumption against the preemption of state police power regulations).

The presumption against preemption in this case can only be overcome by the "clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp., supra.* Accordingly, "the presumption reinforces the appropriateness of a narrow reading of (the federal statute)." *Cippolone*, 112 S.Ct. at 2618.

Furthermore, the Court has recognized that it should not seek out conflicts between state and federal regulation where none clearly exists. *English v. General Electric Co.*, 496 U.S. 72, 110 S.Ct. 2270 (1990), *citing Huron Portland Cement Co. V. Detroit*, 362 U.S. 440, 80 S.Ct. 813 (1960). The Court has failed to find preemption where there is no actual conflict, and where it is possible to comply with both

federal and state law. *Freightliner Corp. V. Myrick*, ___ U.S. ___ , 115 S.Ct. 1483, 1488 (1995).

In this case, GNMA argues that a Texas statute is preempted by 12 U.S.C. § 1721(g). Section 1721 is that section pertaining to the "Management and liquidation functions of GNMA". Subsection (g) deals with the rights of GNMA against an issuer of securities guaranteed by GNMA upon default by the issuer. That portion of § 1721(g) relevant to this inquiry is:

> The Association is hereby empowered, in connection with any guaranty under this subsection, whether before or after any default, to provide by contract with the issuer for the extinguishment, upon default by the issuer, of any redemption, equitable, legal or other right, title, or interest of the issuer in any mortgage or mortgages constituting the trust or pool against which the guaranteed securities are issued; and with respect to any issue of guaranteed securities, in the event of default and pursuant otherwise to the terms of the contract, the mortgages that constitute such trust or pool shall become the absolute property of the Association, subject only to the unsatisfied rights of the holders of the securities based on and backed by such trust or pool. No state or local law, and no federal law (except Federal law enacted expressly in limitation of this subsection after October 8, 1980) shall preclude or limit the exercise by the Association of (A) its power to contract with the issuer on the terms stated in the preceding sentence, (B) its rights to enforce any such contract with the issuer, or (C) its ownership rights, as provided in the preceding sentence, in the mortgages constituting the trust or pool against which the guaranteed securities are issued.

The state statute that was held to be preempted is Texas Property Code § 13.001(a), which provides that an unrecorded conveyance of an interest in a mortgage is void as to a judgment creditor. The effect of the decision below is to hold that Pipkin, a judgment creditor, is deprived of his right to execute against mortgages assigned to GNMA by the judgment debtor, even though GNMA failed to record those assignments. This holding is based upon the decision that the state statute which would void the unrecorded assignment as against the judgment creditor would preclude or limit GNMA's ownership rights in the mortgages, and thus is preempted by the federal law. However, this reading of the federal statute strains its literal meaning, ignores the presumption against preemption, is clearly not a narrow reading of the federal statute, and finds a conflict between the federal and the state statute where the supposed conflict is easily reconciled.

The above quoted portion of the federal statute contains only two sentences. The first sentence clearly provides that GNMA is empowered to contract with an issuer; that, upon default by the issuer, any interest of the issuer in the mortgages would be extinguished; and that the mortgages shall then become the absolute property of GNMA. The second sentence was held by the Court of Appeals to constitute the express preemption. It provides that no local or state law shall preclude or limit the exercise by GNMA of (A) its power to contract as provided in the preceding sentence, (B) its power to enforce its contract with its issuer, or (C) its ownership rights as provided in the preceding sentence.

Thus, the two sentences set forth above deal entirely with GNMA's contracts with its issuer, and it's ability to obtain, without interference from the issuer, ownership of the mortgages. Nothing in either sentence explicitly or implicitly

refers to anyone other than GNMA, an issuer, or the holder of the securities backed by the mortgages. The second sentence states that no state law shall preclude or limit GNMA's ownership rights *as provided in the preceding sentence* (emphasis added). The ownership rights provided in the preceding sentence are GNMA's rights under its contract with its issuer, not GNMA's rights against any third party. The literal reading of the federal statute does not in any way involve a third party claiming an interest in the mortgages; the statute deals only with the parties to the transaction, i.e. GNMA, the issuer, and the holders of the securities backed by the mortgages. Had Congress wanted to clearly express its intent that GNMA need not comply with state recording statutes, it could have done so in a much more forthright manner.

There is very little jurisprudence construing § 1721(g). However, one federal District Court considered the construction of this section in determining whether it could enjoin GNMA from certain actions with regard to its coinsurance obligations to an issuer. That Court recognized that this section dealt solely with GNMA's rights to contract with its issuers:

> Although the legislative history is silent on this point (footnote omitted), the words chosen by Congress are clear. They manifest a desire not to insulate all actions relating to default from judicial review but rather to assure that GNMA would be able to contract with issuers to provide for default were it necessary.

DRG Funding Corp. v. Secretary of Housing and Urban Development, 1988 WL 90107, at 5 (D.D.C. 1988).

Obviously, the state and federal statutes are easily reconciled. To have protected its interest, GNMA need only

have recorded its assignments, as does every other assignee of a Texas[1] mortgage interest. Thus, there is no actual conflict between the state and federal law, even if the federal law is given the meaning for which GNMA argues. Texas' recording statute certainly does not "preclude" GNMA's ownership of the mortgages, since it requires only that GNMA record its interest.

Furthermore, Congress cannot have intended to exempt GNMA from all state regulation of conveyances in real property interests. For instance, what is the effect of this ruling upon the statute of frauds, as it exists in almost every state, which requires conveyances of real property interests to be in writing? Presumably, to hold that § 1721(g) preempts all state limits on GNMA's claim of ownership would also require a finding that the statute of frauds was preempted as to GNMA. Accordingly, if GNMA alleges an oral assignment of mortgages that would be prohibited by state law, that prohibition would also be an impermissible limitation upon GNMA's ownership, and the state statute of frauds would be preempted.

The clear effect of this ruling is to eliminate the ability of any party to rely upon the state real property records. In the simple situation of the sale of a house, the buyer can no longer be sure that he is obtaining a release of the prior mortgage from the legal holder of the mortgage. There is now the possibility in every such transaction that the assignment of the mortgage to GNMA is unrecorded. How does the buyer make sure that the recorded owner of the mortgage is still the owner? Is GNMA going to offer a certification that it is not an unrecorded holder of an interest to allow every single real estate transaction in the country to

---

[1] All fifty states have some state recording statute, many of which are very similar to the Texas statute.

close? If the federal law exempts GNMA from recording its interest, there can only be utter chaos. It is not reasonable to assume that Congress intended such a result.

The holding of the Court of Appeals misconstrues the literal meaning of the federal law by holding that it expressly preempts a state statute dealing with the rights of third parties; the ruling fails to narrowly construe the federal statute as required because of the presumption against preemption of the state act; the ruling finds a conflict between the state and federal law where one does not exist; and it creates results that could not have been intended by Congress.

CONCLUSION

For the foregoing reasons, this Court should grant review of the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

WILLIAM E. KING
Attorney of Record
P. O. Box 309
Kemah, TX 77565
(713) 334-4831

Co-yCounsel:
ANTHONY W. NIMS
1909 Branard
Houston, TX 77098

MARGARET M. McCLURE
909 Fannin, Suite 3005
Houston, TX 77010

Attorneys For Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROGER W. PIPKIN, III,	)	
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	No. 94-6443
MORTGAGE CREDITCORP,	)	(D.C. No.
INC.; WESTMARK	)	CIV-94-901-W)
MORTGAGE CORPORATION,	)	
Defendants,	)	(W.D. Oklahoma)
	)	
and	)	
	)	
MIDLAND MORTGAGE CO.;	)	
MIDFIRST BANK S.S.B.;	)	
NORTHWEST BANK,	)	
Defendants-Appellees,	)	
	)	
v.	)	
	)	
GOVERNMENT NATIONAL	)	
MORTGAGE ASSOCIATION,	)	
Third-Party Defendant-Appellee.	)	

ORDER AND JUDGMENT*

Before MOORE, BRORBY, and EBEL, Circuit Judges.

This appeal presents the question whether a default judgment creditor may divest the interest of Government National Mortgage Association (GNMA) in certain Texas real estate mortgages solely because GNMA failed to record its interest in the mortgages in adherence to state law. Plaintiff Roger W. Pipkin, III appeals the district court's grant of summary judgment in favor of GNMA and its mortgage servicers, Midland Mortgage Co., MidFirst Bank, S.S.B., and Northwest Bank (the Midland Group). The district court held Texas law was superseded by GNMA's enabling statute and Mr. Pipkin was not entitled to execute upon the Texas mortgages because GNMA owned the mortgages as a matter of law. We agree and affirm.

Mr. Pipkin is the judgment creditor of defendants Mortgage Creditcorp, Inc. and Westmark Mortgage Corporation (the WestMark Parties), two defunct mortgage servicing companies. In 1994, Mr. Pipkin obtained a $4.8 million default judgment against the Westmark Parties in a Texas state court. That court then entered a post-judgment

---

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

order instructing the Midland Group, the defendants-in-intervention and third-party plaintiffs, to turn over to Mr. Pipkin several Texas real estate mortgages which the court deemed "nonexempt assets of the [Westmark Parties]."

To execute his judgment on the Oklahoma-based Midland Group, Mr. Pipkin filed the post-judgment order in Oklahoma City, Oklahoma. Subsequently, the Midland Group obtained a stay of execution from the state district court of Oklahoma County, and filed a petition in intervention naming GNMA as third-party defendant. GNMA removed the case to the United States District Court for the Western District of Oklahoma.

There, GNMA and the Midland Group moved for summary judgment, arguing the mortgages sought by Mr. Pipkin were owned by GNMA, not the Westmark Parties. Mr. Pipkin countered that, under Texas law, the Westmark Parties continued to own the mortgages because GNMA failed to record its interest in the mortgages. The district court granted GNMA's and the Midland Group's motions on the ground that GNMA's enabling statute, 12 U.S.C. § 1721(g), expressly preempts any Texas law limiting GNMA's ownership rights in the mortgages.

I.

GNMA is a creature of statute. Under GNMA's enabling statute, Section 1721(g), Congress vested GNMA with broad powers to carry out the congressional objective of establishing and encouraging a secondary market for home mortgages. Section 1721(g) provides:

> The Association [GNMA] is hereby empowered, in connection with any guaranty under this subsection, whether before or after any default, to provide by

> contract with the issuer for the extinguishment, upon default by the issuer, of any redemption, equitable, legal, or other right, title, or interest of the issuer in any mortgage or mortgages constituting the trust or pool against which the guaranteed securities are issued; and with respect to any issue of guaranteed securities, in the event of default and pursuant otherwise to the terms of the contract, *the mortgages that constitute such trust or pool shall become the absolute property of the Association subject only to the unsatisfied rights of the holders of the securities based on and backed by such trust or pool. No State or local law, . . . shall preclude or limit the exercise by the Association of* (A) its power to contract with the issuer on the terms stated in the preceding sentence, (B) *its rights to enforce any such contract with the issuer, or* (C) *its ownership rights, as provided in the preceding sentence, in the mortgages constituting the trust or pool . . . .*

12 U.S.C. § 1721(g) (1) (emphasis added).

GNMA is a government corporation within the United States Department of Housing and Urban Development. It operates a mortgage-backed securities program (MBS Program) to attract investors into the private mortgage market. Under the MBS Program, GNMA authorizes certain private entities (Issuers) to assemble pools of qualified mortgages and to issue securities based on and backed by these pools of federally insured or guaranteed mortgages. The mortgage-backed securities entitle investors to timely payment of principal and interest.

Issuers are responsible for ensuring timely principal and interest payments are made to investors. However, to make these securities more attractive to investors, GNMA

guarantees payment if the Issuers default. This guarantee is backed by the full faith and credit of the United States. Therefore, the United States is liable to the holders of the mortgage-backed securities if the Issuers fail to make payment when due.

The pool of private mortgages provides the source of funds and the primary security for the principal and interest payments. Thus, to protect its interest, GNMA requires Issuers to enter into a contractual agreement with GNMA to convey to GNMA the title of the Issuers to the mortgages. Issuers retain nominal interest in the mortgages to enable them to carry out servicing functions in connection with the mortgages.

All GNMA contracts also empower GNMA to declare the Issuers in default under the MBS Program in certain instances. Upon GNMA's declaration of default, by letter directed to the Issuers, GNMA may divest the Issuers of any interest in the pooled mortgages. Upon the exercise of the divestiture, the pooled mortgages become the absolute property of GNMA, subject only to unsatisfied rights of the holders of the securities backed by the pooled mortgages.

The Westmark Parties were Issuers in GNMA's MBS Program until October 1989 when GNMA declared them in default. At that time, GNMA assumed ownership of the mortgages and took over the obligation to make the principal and interest payments previously made by the Westmark Parties. However, as the parties here agree, GNMA did not take steps to record its interest in the Texas mortgages.

II.

With these facts at hand, we first turn to whether the district court properly granted GNMA's motion for summary

judgment holding the Texas recording statute preempted by GNMA's enabling law. We review a district court's grant of summary judgment de novo. *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1521 (10th Cir. 1992). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c).*

Mr. Pipkin contends by virtue of the Texas recording statute and GNMA's failure to record its interest in the pooled mortgages, the Westmark Parties own those mortgages under Texas law. As a judgment creditor of the Westmark Parties, Mr. Pipkin argues he is entitled to execute on those mortgages.

Mr. Pipkin asserts § 1721(g) does not preempt Texas Property Code Section 13.001(a), which he claims requires GNMA to record its interest in the mortgages.[1] Moreover, Mr. Pipkin argues, the Texas recording statute does not limit GNMA's rights under § 1721(g). In his view, the Texas law protects the rights of third parties by requiring GNMA to record its ownership rights. Therefore, he argues, because GNMA failed to record any assignment of the Westmark Parties' mortgages, GNMA cannot claim rights superior to those the Texas law protects.

---

[1] Section 13.001(a) provides:
A conveyance of real property or an interest in real property or a mortgage or deed of trust is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record as required by law.

Tex. Prop. Code. Ann. § 13.001(a). (West 1993).

We are not persuaded by Mr. Pipkin's argument. Instead, we agree with the district court that § 1721(g) expressly preempts Texas Property Code Section 13.001(a) to the extent Texas law would require GNMA to record its interest in the Texas mortgages to avoid Mr. Pipkin's rights as a judgment creditor.[2]

The Supremacy Clause of Article VI of the Constitution provides Congress with the power to preempt state law. "Preemption occurs when Congress expresses a clear intent to preempt in a federal statute; . . . or when state law is an obstacle to the objectives and purpose of Congress." *Kansas ex rel Todd v. United States*, 995 F.2d 1505, 1509-10 (10th Cir. 1993) (citing *Louisiana Public Serv. Comm. v. FCC*, 476 U.S. 355, 368-69 (1986)).

By explicitly stating in § 1721(g): "[n]o State or local law . . . shall preclude or limit the exercise [by GNMA] of . . . its right to enforce [its] contracts . . . or . . . its ownership rights," 12 U.S.C. § 1721(g)(1), Congress has emphatically expressed its intent to preempt any state law which would limit GNMA's rights to the mortgage pools in the event of an Issuer's default. Even requiring GNMA to record its interest in the mortgages would conflict with the power and rights granted to GNMA under its federal enabling statute.

Not only would imposition of the Texas recording statute inhibit GNMA's power to invest itself with title to the pooled mortgages, but it would also frustrate the purposes behind passage of § 1721(g). To compensate for the

---

[2] We need not decide here whether Section 13.001(a) actually requires mortgage assignees to record their interest. Instead, we merely hold to the extent Section 13.001(a) so requires, it is preempted by Section 1721(g).

government's potential liability under the MBS Program, Congress sought to ensure GNMA had access to the pool of mortgages which provide the primary source of funds for the principal and interest payments. Accordingly, Congress vested GNMA with broad authority to divest defaulted Issuers' interest in the pooled mortgages.

Furthermore, imposition of the state law frustrates the congressional mandate that GNMA conduct its operations with "minimum loss to the Federal Government." 12 U.S.C. § 1716(c).[3] If the Texas recording statute could divest GNMA of the mortgages, the outstanding securities guaranteed by GNMA would no longer be "based on and backed by" the mortgages. Thus, the government would be forced to pay the investors out of general Treasury funds.

Mr. Pipkin argues GNMA can protect its interests by recording the mortgages just as any other purchaser. However, even if GNMA could protect itself by recording its interest, state law is preempted when it imposes governmental burdens exceeding the requirements of federal law. *See Baylson v. Disciplinary Bd. of the Supreme Court of Pa.*, 975 F.2d 102, 111-12 (3d Cir. 1992), *cert. denied*, 113 S.Ct. 1578 (1993) (state rule of professional conduct requiring federal prosecutors to obtain judicial approval before subpoenaing any attorney was preempted because it

---

[3] 12 U.S.C. § 1716 states, in pertinent part:

> The Congress declares that the purposes of this subchapter are to establish secondary market facilities for home mortgages, to provide that the operations thereof shall be financed by private capital to the maximum extent feasible, and to authorize such facilities to . . .(c) manage and liquidate federally owned mortgage portfolios in an orderly manner, with a minimum of adverse effect upon the home mortgage market and minimum loss to the Federal Government.

imposed additional conditions not contemplated by Congress).

Although Mr. Pipkin asserts otherwise, the preemption of Section 13.001(a) harms no property interests here. Section 1721(g) does not create new mortgages, or "phantom mortgages" as Mr. Pipkin argues. The mortgages Mr. Pipkin seeks to execute upon already exist. The only question is whether GNMA or the Westmark Parties (and now Mr. Pipkin) owns the mortgages. Section 1721(g) merely resolves that question in favor of GNMA.

III.

Mr. Pipkin next contends the district court erred in granting summary judgment to GNMA and the Midland Group because GNMA failed to provide evidence of its ownership of the mortgages or to present evidence that the Westmark Parties were Issuers under the MBS Program. We disagree.

In passing upon this issue, we must review the record and consider the evidence in the light most favorable to the non-moving party. *Dreiling v. Peugeot Motors of Am., Inc.*, 850 F.2d 1373, 1377 (10th Cir. 1988). The record and the briefs amply demonstrate both the Westmark Parties' participation in the MBS Program and GNMA's ownership of the Texas mortgages.

George Anderson, a GNMA official, stated in his declaration "the Westmark Parties entered into GNMA Contracts . . . [and] were issuers under the GNMA MBS program until GNMA declared them in default . . . ." Lynn Coleman, Vice President of Northwest Bank, and Ken R. Clark, Senior Vice President of MidFirst Bank, S.S.B., and Senior Vice President of Midland Mortgage Co., stated in

their affidavits that Northwest Bank, MidFirst Bank, S.S.B., and Midland Mortgage Co. had no mortgages or other loan documents referring to the Westmark Parties other than loan documents of GNMA pooled mortgages.[4] We think this uncontroverted evidence is sufficient to show both the Issuer status of the Westmark Parties and GNMA's ownership of the mortgages.

IV.

Mr. Pipkin also contends the district court erred in granting summary judgment for GNMA and the Midland Group without honoring Mr. Pipkin's Rule 56(f) request.[5] We review a district court's denial of a Rule 56(f) motion for an abuse of discretion. *Jensen v. Redevelopment Agency of Sandy City*, 998 F.2d 1550, 1553 (10th Cir. 1993). "Under the abuse of discretion standard, a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of

---

[4] Mr. Pipkin argues these statements are inadmissible hearsay because they are based solely on knowledge gleaned from bank records. We disagree. Ms. Coleman's and Mr. Clark's respective positions and their personal knowledge of the banks' custodial duties in connection with GNMA's MBS Program meet the requirements of Fed., R. Civ. P. 56(e). *See, e.g., Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1018 (9th Cir. 1990) (corporate officers' personal knowledge and competence to testify were reasonably inferred from their positions and the nature of their participation in the contested matters).

[5] Rule 56(f) provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

judgment or exceeded the bounds of permissible choice in the circumstances." *United States v. Ortiz*, 804 F.2d 1161, 1164, n.2 (10th Cir. 1986). Here, there is no evidence the district court abused its discretion.

To invoke the protection of Rule 56(f), we have held "the party filing the affidavit must state with specificity how 'the desired time would enable [the non-moving party] to meet its burden in opposing summary judgment.'" *Jensen*, 998 F.2d at 1554 (alteration in original) (quoting *Pasternak v. Lear Petroleum Exploration, Inc.*, 790 F.2d 828, 833 (10 Cir. 1986)). Rule 56(f) "may not be invoked by the mere assertion that discovery is incomplete or that specific facts necessary to oppose summary judgment are unavailable . . . ." *Pasternak*, 790 F.2d at 833. Furthermore, " a mere assertion 'that the evidence supporting a [party's] allegation is in the hands of the [opposing party] is insufficient to justify a denial of a motion for summary judgment under Rule 56(f).'" *Weir v. Anaconda Co.*, 773 F.2d 1073, 1083 (10th Cir. 1985) (quoting *Patty Precision v. Brown & Sharpe Mfg. Co.*, 742 F.2d 1260, 1264 (10th Cir. 1984) (brackets added by *Patty Precision*) (quoting *Contemporary Mission, Inc. v. United States Postal Serv.*, 648 F.2d 97, 107 (2d Cir. 1981)).

The affidavit supporting Mr. Pipkin's Rule 56(f) request was extremely brief. In it, Mr. Pipkin's attorney stated she had twice requested GNMA to produce records or other competent evidence to support its claim of ownership of the Westmark Parties' mortgages. Mr. Pipkin's attorney then stated, "I cannot properly prosecute Mr. Pipkin's claim without the requested discovery or additional discovery as may become necessary during the pendency of this matter." This affidavit is insufficient to meet the requirements of Rule 56(f).

We have also held parties must not be "dilatory" in making Rule 56(f) requests. *Jensen*, 998 F.2d at 1554. Here, the district court found Mr. Pipkin had "ample" time to engage in discovery and neglected to use this time wisely. The record reveals Mr. Pipkin failed to file any formal discovery requests during the four-month time period prior to GNMA's motion for summary judgment. Accordingly, we cannot say the district court abused its discretion in denying Mr. Pipkin's Rule 56(f) request.

AFFIRMED.

Entered for the Court

John Porfilio Moore
Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROGER W. PIPKIN, III, Plaintiff - Appellant,	)	
v.	)	
	)	No. 94-6443
MORTGAGE CREDITCORP, INC., and WESTMARK MORTGAGE CORPORATION, Defendant,	)	
and	)	
MIDLAND MORTGAGE CO.; MIDFIRST BANK SSB; NORTHWEST BANK, Defendants - Appellees,	)	
v.	)	
GOVERNMENT NATIONAL MORTGAGE ASSOCIATION, Third-Party-Defendant - Appellee.	)	

ORDER
Filed March 14, 1996

Before PORFILIO, BRORBY and EBEL, Circuit Judges.

The court has for consideration appellant's motion for reconsideration of this court's order of February 23, 1996, which denied the petition for rehearing as untimely.

Upon consideration whereof, the motion is granted. The petition for rehearing is considered timely filed, and is denied on the merits.

Entered for the Court

PATRICK FISHER, Clerk

/s/ Opal A. Carter
By Opal A. Carter
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ROGER W. PIPKIN, III, Plaintiff,	)	
vs.	)	
	)	No. CIV-94-901-W
MORTGAGE CREDITCORP, INC., et al. Defendants.	)	
MIDLAND MORTGAGE CO., MIDFIRST BANK, S.S.B., and NORTHWEST BANK, Defendants in Intervention and Third-Party Plaintiffs,	)	
vs.	)	
GOVERNMENT NATIONAL MORTGAGE ASSOCIATION, Third-Party Defendant.	)	

ORDER

This matter comes before the Court on the Motions for Summary Judgment filed by Midland Mortgage Company (Midland Mortgage), MidFirst Bank, S.S.B. (MidFirst), Northwest Bank (Northwest) (collectively "Midland") and Government National Mortgage Association (GNMA), GNMA's Motion to Quash and Dismiss Execution Proceedings, the response in opposition thereto of the

plaintiff, Roger W. Pipkin III, and Midland's reply. Based upon these submissions, the Court makes its determination.

Pipkin filed suit in the District Court of Harris County, Texas, against Mortgage Creditcorp, Inc. and Westmark Mortgage Corporation (collectively "Westmark") and on April 6, 1994, obtained a default judgment in the amount of $4,875,478.00 against said parties. Pipkin learned that Westmark held mortgages on certain properties and in May 1994, Pipkin obtained an order entitled "Turnover Order in Aid of Judgment" from the Texas court. This Order identified the mortgages to which Westmark was mortgagee and directed Midland to turn these mortgages over to Pipkin.

Pipkin then sought a writ of execution in the District Court of Oklahoma County, Oklahoma, and caused execution papers to be issued and served on Midland. Midland in turn filed a Petition in Intervention and joined GNMA as a necessary and indispensable party. GNMA removed the action to this Court.

GNMA is a government corporation within the United States Department of Housing and Urban Development. 12 U.S.C. § 1717. It operates a mortgage-backed securities program (MBS Program), the purpose of which is to attract private capital into the secondary market for home mortgages. Under the program, GNMA authorizes qualified private parties--"issuers"--to issue securities to private investors. The securities are "based on and backed by," *id.* § 1721(g)(1), groups or "pools" of federally-insured or guaranteed residential mortgages.

Issuers collect monthly mortgage payments from borrowers and transmit the appropriate amounts to the holders of the mortgage-backed securities. GNMA

guarantees that these investors will receive timely payments of principal and interest on the securities.

Issuers participating in the MBS Program are required to transfer, assign and convey to GNMA all right, title and interest in and to the mortgages, notes, other related instruments and all related payments that back the securities. They retain only nominal title and perform only certain servicing functions. *E.g.*, *Consolidated Mortgage & Finance Corp. v. Landrieu*, 493 F. Supp. 1284, 1287 (D.D.C. 1980) (assignments are in recordable form but not recorded so that nominal title remains in issuer and assists issuer in servicing duties.

It cannot be disputed that Westmark participated as an issuer in GNMA's MBS Program. As an issuer, Westmark was required to transfer, assign and otherwise convey to GNMA all right, title and interest in and to all pooled mortgages that backed securities issued by Westmark under the MBS Program. And as an issuer, Westmark retained only nominal title in the mortgages and performed only certain servicing functions with regard to the same.

On October 30, 1989, GNMA declared Westmark in default. All contracts between GNMA and issuers expressly provide that if an issuer is declared in default, all remaining right, title and interest of the issuer in any mortgages is extinguished and such mortgages became the absolute property of GNMA, subject only to the unsatisfied rights of holders of securities based on and backed by the pooled mortgages. 12 U.S.C. § 1721(g)(1). In these situations, GNMA assumes the role of "issuer" with regard to the mortgage-backed securities and makes the required payments to the holders of the securities.

After GNMA declared Westmark in default, GNMA engaged MidFirst to perform the servicing functions once performed by Westmark. Midland Mortgage assists MidFirst in these duties and Northwest has physical custody of the mortgages.

The affidavit of Ken R. Clark, Senior Vice President of MidFirst, establishes that all mortgages being serviced by MidFirst and Midland Mortgage that reflect Westmark as the mortgagee are serviced by MidFirst and Midland Mortgage on behalf of GNMA under the MBS Program. Affidavit of Ken R. Clark (August 19, 1994). The affidavit of Lynn Coleman, Vice President of Northwest, establishes that all loan documents that reflect Westmark as mortgagee are being maintained by Northwest as custodian for MidFirst, as servicer under GNMA's MBS Program and that Northwest does not possess any loan documents for mortgages that reflect Westmark as mortgagee other than as an authorized GNMA custodian for GNMA's MBS Program. Affidavit of Lynn Coleman (August 19, 1994).

Pipkin has denied that GNMA owns the mortgages in question and alternatively, has argued that GNMA's ownership is void against judgment creditors because it is unrecorded.[1] The Court disagrees.

Because the mortgages involved in this case are part of GNMA's MBS Program, once Westmark was declared in default on October 30, 1989, GNMA became absolute owner

---

[1] Pipkin has argued that summary judgment is not appropriate because discovery has not yet been conducted. The Court deems the record sufficient under the circumstances to resolve the legal issues raised by the parties. Furthermore, this lawsuit was removed to this Court on June 13, 1994, and the parties have had ample time to engage in discovery pursuant to Rule 69, F.R.Civ.P., on the issues raised in the pending motions.

of the mortgages. The fact that GNMA did not record evidence of its ownership in accordance with Texas or Oklahoma recording statutes does not defeat GNMA's claim of ownership.

Section 1721(g)(1) provides that GNMA is

> "empowered . . . to provide by contract with the issuer for the extinguishment upon default of the issuer, of any . . . equitable, legal, or other right, title, or interest of the issuer in any mortgage or mortgages constituting the trust or pool against which the guaranteed securities are issued; and with respect to any issue of any guaranteed securities, in the event of default and pursuant otherwise to the terms of the contract, the mortgages that constitute such trust or pool shall become the absolute property of [GNMA] . . . . No State or local law . . . shall preclude or limit the exercise by . . . [GNMA] of (A) its power to contract with the issuer on the terms stated in the preceding sentence, (B) its rights to enforce any such contract with the issuer, or (C) its ownership rights, as provided in the preceding sentence, in the mortgages constituting the trust or pool which the guaranteed securities are issued."

12 U.S.C. § 1721(g).

Congress has clearly expressed an intent in section 1721(g)(1) to preempt state law, whether it be the law of Texas or Oklahoma. Such intent cannot be defeated by Pipkin's argument that he had no notice that GNMA has been the absolute owner of the mortgages since 1989.

Accordingly, the Court

(1) GRANTS the Motion for Summary Judgment filed by Midland Mortgage, MidFirst and Northwest on August 26, 1994;

(2) GRANTS GNMA's Motion for Summary Judgment and to Quash and Dismiss Execution Proceedings filed on September 2, 1994; and

(3) DIRECTS that judgment issue forthwith.

ENTERED this 9th day of September, 1994.

/s/ Lee R. West
LEE R. WEST
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGEMENT
DOCKET ON 11-9-94

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ROGER W. PIPKIN, III, Plaintiff,	)	
vs.	)	No. CIV-94-901-W
MORTGAGE CREDITCORP, INC., et al. Defendants.	)	
MIDLAND MORTGAGE CO., MIDFIRST BANK, S.S.B., and NORTHWEST BANK, Defendants in Intervention and Third-Party Plaintiffs,	)	
vs.	)	
GOVERNMENT NATIONAL MORTGAGE ASSOCIATION, Third-Party Defendant.	)	

JUDGMENT

Having determined that the plaintiff is not entitled to any relief in this action from the defendants-in-intervention, the Court ORDERS that judgment should be and is hereby entered in favor of defendants-in-intervention Midland Mortgage Company, MidFirst Bank, S.S.B, and Northwest Bank and against Plaintiff Roger W. Pipkin, III. The Court further ORDERS that the third-party complaint filed by third-party plaintiffs Midland Mortgage Company, MidFirst Bank, S.S.B., and Northwest Bank against third-party defendant

Government National Mortgage Association should be and is hereby DISMISSED.

Dated at Oklahoma City, Oklahoma, this 9th day of November, 1994.

/s/ Lee R. West
LEE R. WEST
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGEMENT
DOCKET ON 11-9-94

No. 95-2009

(2)

Supreme Court, U.S.
FILED
JUL 15 1996
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ROGER W. PIPKIN, III,
Petitioner,
v.

MORTGAGE CREDITCORP, INC.,
WESTMARK MORTGAGE CORPORATION,
MIDLAND MORTGAGE CO., MIDFIRST BANK
S.S.B., NORTHWEST BANK,
Respondents.

GOVERNMENT NATIONAL MORTGAGE ASSOCIATION,
Third-Party Defendant, Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS MIDLAND MORTGAGE CO., MIDFIRST BANK S.S.B. AND NORTHWEST BANK

JAMES P. LINN
B.J. ROTHBAUM *
LINN & NEVILLE, P.C.
1200 Bank of Oklahoma Plaza
201 Robert S. Kerr Avenue
Oklahoma City, OK 73102-4289
(405) 239-6781
Attorneys for Respondents Midland Mortgage Co., Midfirst Bank S.S.B. and Northwest Bank
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

16 pp

QUESTIONS PRESENTED

This case involves an effort by the holder of a Texas state court default judgment to execute on property which his judgment debtor never owned. The questions presented are:

(1) Whether, as a matter of Oklahoma or Texas law, a judgment lien can encompass property which the judgment debtor did not beneficially own at the time the judgment was entered?

(2) In the event the law of either State might grant such extraordinary effect to a judgment lien, is the relevant state law preempted by § 301(g) of the National Housing Act (12 U.S.C. § 1721(g)) to the extent state law would preclude or limit the rights granted to the Government National Mortgage Association ("GNMA") in connection with its ownership and administration of mortgages and related obligations issued under the Act?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED	1
STATEMENT	3
Proceedings Below	3
The MBS Program	4
REASONS FOR DENYING THE WRIT	6
I. THE UNPUBLISHED OPINION OF THE COURT OF APPEALS IS CLEARLY CORRECT AND PRESENTS NO ISSUE WARRANTING FURTHER REVIEW	6
II. PETITIONER WOULD NOT BE ENTITLED TO REVERSAL OF THE JUDGMENT BELOW EVEN IF STATE LAW WAS NOT PREEMPTED BY FEDERAL LAW	8
A. Oklahoma Law	8
B. Texas Law	10
CONCLUSION	12

TABLE OF AUTHORITIES

Cases	Page
Buell Cabinet Co. Inc. v. Suddeth, 608 F.2d 431 (10th Cir. 1979)	10
Consolidated Mortgage & Finance Corp. v. Landrieu, 493 F. Supp. 1284 (D.D.C. 1980)	6
Dandridge v. Williams, 397 U.S. 471 (1970)	8
Fidelity Federal Savings and Loan Association v. de la Cuesta, 458 U.S. 139 (1982)	7
First of Denver Mortgage Investors v. Riggs, 692 P.2d 1358 (Okla. 1984)	9
First State Bank of Amarillo v. Jones, 183 S.W.2d 874 (Tex. 1916)	7
Free v. Bland, 369 U.S. 663 (1962)	7
Gibralter Savings Association v. Martin, 784 S.W.2d 555 (Tex. App.—Amarillo 1990, writ denied)	11
J.I. Case Threshing Machine Co. v. Walton Trust Co., 39 Okla. 748, 136 P. 769 (1912)	7, 9
Kennedy v. Roff, 178 Okla. 71, 61 P.2d 1044 (1939)	10
Longfalls Realty Co. v. Anchor Electric Co., 405 S.W.2d 170 (Tex. Civ. App.—Dallas 1966, no writ)	11
Lunn v. Kellison, 64 Okla. 168, 153 P. 1136 (1916)	10
Texas American Bank v. Resendez, 706 S.W.2d 343 (Tex. App.—Amarillo 1986, no writ)	11
United States v. Union Central Life Insurance Co., 368 U.S. 291 (1961)	7
Statutes-Federal	
12 U.S.C. § 1717	4
12 U.S.C. § 1721(g)	2
Statutes-State	
12 O.S.A. § 706	2
12 O.S.A. § 721	3
Texas Property Code § 13001(a)	2
Constitutional Provision	
U.S. Const. Art. VI, Clause 2	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 95-2009

ROGER W. PIPKIN, III,
Petitioner,

v.

MORTGAGE CREDITCORP, INC.,
WESTMARK MORTGAGE CORPORATION,
MIDLAND MORTGAGE CO., MIDFIRST BANK
S.S.B., NORTHWEST BANK,
Respondents.

GOVERNMENT NATIONAL MORTGAGE ASSOCIATION,
Third-Party Defendant, Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENTS MIDLAND MORTGAGE CO., MIDFIRST BANK S.S.B. AND NORTHWEST BANK

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Const. Art. VI, Clause 2 provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State

shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. 12 U.S.C. § 1721(g), provides in pertinent part:

The Association is hereby empowered, in connection with any guaranty under this subsection, whether before or after any default, to provide by contract with the issuer for the extinguishment, upon default by the issuer, of any redemption, equitable, legal or other right, title, or interest of the issuer in any mortgage or mortgages constituting the trust or pool against which the guaranteed securities are issued; and with respect to any issue of guaranteed securities, in the event of default and pursuant otherwise to the terms of the contract, the mortgages that constitute such trust or pool shall become the absolute property of the Association, subject only to the unsatisfied rights of the holders of the securities based on and backed by such trust or pool. No state or local law, and no federal law (except Federal law enacted expressly in limitation of this subsection after October 8, 1980) shall preclude or limit the exercise by the Association of (A) its power to contract with the issuer on the terms stated in the preceding sentence, (B) its rights to enforce any such contract with the issuer, or (C) its ownership rights as provided in the preceding sentence, in the mortgages constituting the trust or pool against which the guaranteed securities are issued.

3. Texas Property Code § 13001(a) provides:

A conveyance of real property or an interest in real property or a mortgage or deed of trust is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record as required by law.

4. 12 O.S.A. § 706 provides in pertinent part:

A. Creation of Lien. A judgment to which this section applies shall be a lien on the real estate of the

judgment debtor within a county only from and after a Statement of Judgment made by the judgment creditor or his attorney, substantially in the form prescribed by the Administrative Director of the Courts, has been filed in the office of the county clerk in that county.

* * * *

2. A lien created pursuant to this section shall only affect the real estate of judgment debtors whose names appear in the Statement of Judgment.

5. 12 O.S.A. § 721 provides in pertinent part:

A copy of any foreign judgment authenticated in accordance with the applicable Act of Congress or of the statutes of this state may be filed in the office of the court clerk of any county of this state. The clerk shall treat the foreign judgment in the same manner as a judgment of the district court of any county of this state. A judgment so filed has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of a district court of this state and may be enforced or satisfied in like manner. Provided, however, that no such filed foreign judgment shall be a lien on real estate of the judgment debtor until a certified copy of the judgment so filed is also filed in the office of the county clerk in the county where the real estate is located.

STATEMENT

Proceedings Below

Petitioner is the holder of a default judgment obtained in Texas state court against two defunct non-parties, Mortgage Creditcorp, Inc. and Westmark Mortgage Corporation (collectively the "Westmark parties"). Prior to 1989, the Westmark parties had been "issuers" and "servicers" of real estate mortgages guaranteed by the Government National Mortgage Association ("GNMA").

On October 30, 1989, the Westmark parties defaulted on their obligations to GNMA. GNMA then declared the

Westmark parties in default. Thereafter, Midland Mortgage Co., Midfirst Bank S.S.B. and Northwest Bank (collectively the "Midland parties") contractually assumed the servicing obligations previously performed by the Westmark parties.

According to petitioner, in 1994 he obtained a judgment against the Westmark parties (which no longer existed) for the alleged failure of the Westmark parties to provide petitioner with a lien-free house. Petitioner's default judgment was for approximately $5 million. Neither GNMA nor the Midland parties were parties to petitioner's Texas state court proceeding nor were GNMA or the Midland parties alleged to have been involved in the conduct giving rise to the judgment.

Petitioner thereafter sought to execute on his judgment in Oklahoma (the location of the Midland parties) by serving writs of execution on the Midland parties seeking "goods and chattels" of the Westmark parties, i.e., the promissory notes and accompanying mortgages which the Westmark parties had formerly serviced for GNMA. The Midland parties obtained a stay of the writs of execution and filed a petition in intervention in Oklahoma state court joining GNMA as a necessary party. GNMA then removed the action to the United States District Court for the Western District of Oklahoma.

The district court granted motions for summary judgment in favor of the Midland parties and GNMA and dismissed the Midland parties third-party complaint against GNMA as moot. The Court of Appeals for the Tenth Circuit, in an unpublished *per curiam* opinion, affirmed.

The MSB Program

GNMA is a government corporation located within the Department of Housing and Urban Development (12 U.S.C. § 1717). GNMA administers the Mortgage-Backed Securities ("MBS") program pursuant to 12 U.S.C. § 1721(g). The goal of the program is to attract capital

into the secondary market for moderate income home loans, thus increasing the availability of low income housing in the United States.

Under the MBS program, GNMA authorizes private entities ("issuers" and "servicers") to issue securities backed by large groups or "pools" of home mortgages which are insured or guaranteed by agencies of the federal government such as the Federal Housing Administration or the Department of Veterans Affairs. The securities are sold to private investors and the sale proceeds are used to provide funds for mortgage loans. The issuers then service the securities and the mortgages collateralizing those securities. This includes such routine tasks as collecting monthly mortgage payments from mortgagors and using the funds to make the appropriate payments to securities holders.

Pursuant to 12 U.S.C. § 1721(g), the full faith and credit of the United States is pledged to guarantee timely payment of principal and interest to the securities holders. This, of course, makes the securities an appealing investment for millions of private investors. On the other hand, it exposes the government to potentially enormous liability if the issuers do not make the required payments.[1]

Because of the size and scope of the MBS program, GNMA does not attempt to itself administer all aspects of the program. Instead, GNMA contracts with private banks and mortgage lending institutions to serve as "issuers" and/or "servicers" of designated pools of mortgages within the MBS program. The Midland parties perform these services for GNMA with regard to the promissory notes and accompanying real estate mortgages which petitioner sought to seize.

The evidence—undisputed in the district court and unchallenged in the court of appeals—established that GNMA issuers are always required to enter into standard-

---

[1] According to 2 Nelson & Whitman, *Real Estate Finance Law*, Sec. 11.3 at p. 76 (3d ed. 1993) GNMA's mortgage guarantees aggregated $63 billion in 1991, alone.

ized contracts with GNMA. GNMA's contracts require its issuers or servicers to convey to GNMA all rights in the pool of mortgages and the promissory notes which the mortgages secure. However, to simplify the issuer or servicer's tasks in administering the mortgages and accompanying promissory notes (sending monthly statements to mortgagors, initiating foreclosure actions, etc.) the issuer or servicer retains nominal legal title to the mortgages and records them in its name. *See*, e.g., *Consolidated Mortgage & Finance Corp. v. Landrieu*, 493 F. Supp. 1284, 1287 (D.D.C. 1980). Even this nominal legal title to the promissory notes and mortgages is extinguished the moment GNMA notifies an issuer or servicer that it is in default on any obligation which it has undertaken on behalf of GNMA. 12 U.S.C. § 1721(g)(1). Such a notice of default constitutes "extinguishment" of all legal or equitable title or interest of the issuer in any pooled mortgage and, at that time, the mortgages again become "the absolute property of [GNMA] . . . ." *Id.* Pursuant to the statute, "no state or local law" can "preclude or limit" GNMA's contractual authority with its issuers or its absolute ownership rights "in the mortgages constituting the trust or pool. . . ." *Id.*

GNMA issued its notice of default to the Westmark parties in 1989, more than five years before Pipkin asserts he obtained his *in absentia* judgment against those parties.

REASONS FOR DENYING THE WRIT

I. THE UNPUBLISHED OPINION OF THE COURT OF APPEALS IS CLEARLY CORRECT AND PRESENTS NO ISSUE WARRANTING FURTHER REVIEW.

The explicit statement of federal preemption found in 12 U.S.C. § 1721(g) is as clear as the English language permits:

> No state or local law . . . shall preclude or limit the exercise by [GNMA] of . . . its ownership rights . . . in the mortgages. . . .

As the courts below correctly held, to the extent local Texas law might impair GNMA's absolute ownership rights in the pooled mortgages in question, that local law is, beyond question, preempted by § 1721(g). Similarly, to the extent local Texas law might require GNMA—or private parties acting on behalf of GNMA—to record in local property records notices of default, assignments of mortgages or the like, that local law would have the effect of preclud[ing] or limit[ing] the exercise by [GNMA] of . . . its ownership rights . . . in the mortgages . . ." and is, equally, preempted.

The opinion below, in so holding, created no conflict with any decision of any other court of appeals and is not even arguably in tension with any decision of this Court. Quite the contrary. *See*, e.g., *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 139, 158-59 (1982) (federal regulations concerning due-on-sale clauses in mortgages issued by federally created savings and loans preempted contrary provisions of state law); *United States v. Union Central Life Insurance Co.*, 368 U.S. 291, 296 (1961) (Michigan statute authorizing the filing of a federal tax lien notice only if it contained a description of the liened property preempted by contrary federal regulations). *See also, Free v. Bland*, 369 U.S. 663, 666 (1962).

As a matter of the law of either Texas (*First State Bank of Amarillo v. Jones*, 183 S.W.2d 874, 876 (Tex. 1916)) or Oklahoma (*J.I. Case Threshing Machine Co. v. Walton Trust Co.*, 39 Okla. 748, 748 P. 769 (1912)), petitioner, as a judgment creditor of the Westmark parties, could only execute on property actually owned by the Westmark parties at the time judgment was entered. The Westmark parties never beneficially owned the promissory notes and accompanying mortgages here in question and even nominal legal title had been absolutely extinguished by GNMA under section 1721(g) more than five years before petitioner obtained his judgment.

II. PETITIONER WOULD NOT BE ENTITLED TO REVERSAL OF THE JUDGMENT BELOW EVEN IF STATE LAW WAS NOT PREEMPTED BY FEDERAL LAW.

The courts below resolved this litigation against petitioner by holding that the Texas recording statute upon which petitioner relies, Tex. Prop. Code § 13.001(a), was preempted by the express language of 12 U.S.C. § 1721(g) insofar as GNMA and GNMA's servicers—the Midland parties—are concerned. That holding is unexceptionable. In addition, however, review in this Court is unwarranted because petitioner's attempt to obtain a writ of execution against the promissory notes and mortgages in question would fail as a matter of Oklahoma or Texas state law.

Mr. Pipkin's petition for review in this Court assumes without discussion that he possesses the rights of a Texas state law judgment creditor and that, as a matter of Texas law, he would be entitled to a writ of execution against the promissory notes and real estate mortgages serviced for GNMA by the Midland parties. Both assumptions are erroneous. While the courts below did not find it necessary to decide these points, they were briefed and argued in both courts by GNMA and the Midland parties and are properly presented here as alternative grounds for denying review of the judgment below. *See*, e.g., *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970) (the "prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the [lower] court").

A. Oklahoma Law.

The Midland parties all have their principal place of business in Oklahoma and the promissory notes and mortgages upon which Pipkin seeks a writ of execution are located there. Accordingly, Pipkin registered his default judgment in Oklahoma pursuant to the Uniform Enforcement of Foreign Judgments Act, enacted in Oklahoma as

12 O.S.A. § 719 *et seq.* When petitioner did so, the Texas judgment became entitled to "the same effect . . . as a judgment of a district court of [Oklahoma] and [could] be enforced or satisfied in like manner." 12 O.S.A. § 721. Thus, petitioner's "filing of a Texas judgment pursuant to the Uniform Act gave [him] 'the same rights [he] would have had had the judgment been that of a [district court of Oklahoma]'." *First of Denver Mortgage Investors v. Riggs,* 692 P.2d 1358, 1362 (Okla. 1984) (citations omitted). Pipkin's status as the equivalent of an Oklahoma judgment lien holder is fatal to his attempt to execute on the promissory notes and mortgages here at issue. This is so because Pipkin's only judgment debtor was Westmark. And, many years before Pipkin obtained his judgment against Westmark, GNMA had become the "absolute owner" of the notes and mortgages in question by operation of the relative provisions of GNMA's enabling act. *See,* 12 U.S.C. § 1721(g).

Petitioner complains that GNMA did not record its ownership in local Texas real property records. Under Oklahoma law, however, the lack of recordation is utterly irrelevant because petitioner is a mere judgment lien holder, not a bona fide purchaser or third-party creditor for value.

As long ago as *J.I. Case Threshing Machine Co. v. Walton Trust Co.,* 39 Okla. 748, 136 P. 769 (1912) the Oklahoma Supreme Court held:

> The lien of a judgment attaches only to the interest in real estate owned by the judgment defendant; judgment creditors are not bona fide purchasers. Such creditors part with nothing to acquire the lien . . . . The judgment lien . . . is a lien only on the actual interest of the judgment debtor, whatever that may be. *Therefore, though the judgment debtor may appear to have an interest as a matter of record, if he has none in fact, no lien can attach.* (emphasis supplied).

Accord, e.g., *Lunn v. Kellison*, 64 Okla. 168, 153 P. 1136 (1916); *Kennedy v. Roff*, 178 Okla. 71, 61 P.2d 1041 (1939).

Both the federal district judges resident in Oklahoma and the Tenth Circuit have repeatedly applied this fundamental principle of Oklahoma law. *See*, e.g., *Buell Cabinet Co. Inc. v. Suddeth*, 608 F.2d 431, 435 (10th Cir. 1979) ("under Oklahoma law . . . the recording statutes exist to protect bona fide purchasers . . . not judicial lien holders.")

Petitioner had only the rights which an Oklahoma judgment creditor would have had under the same circumstances. An Oklahoma judgment creditor could have had no enforceable lien upon any promissory notes or mortgages which Westmark did not in fact own at the time the judgment lien came into existence, regardless of the state of record title. Therefore, petitioner could have acquired no such right.

B. Texas Law.

The Midland parties believe that the opinions of the courts below are sufficient to demonstrate that all rights of mortgagees, assignees or other holders of interests in promissory notes or mortgages which are a part of GNMA's MBS program are controlled exclusively by the terms of 12 U.S.C. § 1721 and that any conflicting provision of the law of any state has been expressly preempted by Congress. The Midland parties also believe we have shown above that, to the extent the law of any state may be relevant, it is the law of Oklahoma—under which petitioner's attempt to obtain a writ of execution against promissory notes or mortgages serviced by the Midland parties would fail.

In addition, however, review should be denied in this Court for the independent reason that an examination of relevant Texas law demonstrates petitioner's claim would also fail under the law of that state. Petitioner places exclusive reliance upon a single sentence in a single

statute. Section 13.001(a), Tex. Prop. Code. The section states in its entirety:

> A conveyance of real property or an interest in real property or a mortgage or a deed of trust is void as to a creditor or a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or approved and filed for record as required by law.

While the Texas statute petitioner relies upon is peculiar in its wording, the Texas courts have uniformly limited its operation to an "unrecorded *deed* executed by [a] judgment *debtor*", *Gibraltar Savings Association v. Martin*, 784 S.W.2d 555, 557 (Tex. App.—Amarillo 1990, writ denied), or a similar written instrument conveying a present interest in real estate. *Texas American Bank. v. Resendez*, 706 S.W.2d 343, 346 (Tex. App.—Amarillo 1986, no writ).

Texas courts have also construed section 13.001(a) as being strictly limited to

> the actual interest which the judgment debtor has in the estate at the time the judgment lien arises. The rationale . . . is that the judgment lien holder is not in any sense an innocent purchaser. 'If [the judgment lien holder's] lien fails to attach, he loses nothing. His judgment still remains unimpaired in its full amount. In such a case, [failure to record an assignment of a mortgage] has not resulted in any injury to the judgment creditor.' *Resendez, supra* (citations omitted).

Accord, Longfalls Realty Co. v. Anchor Electric Co., 405 S.W.2d 170, 173 (Tex. Civ. App.—Dallas 1966, no writ) (holder of unrecorded assignment of mortgage has priority over holder of recorded judgment lien).

In sum, petitioner could not obtain a writ of execution against the promissory notes and mortgages owned by GNMA and serviced by the Midland parties under either

Oklahoma or Texas law relating to the rights of judgment lien holders without regard to the question of federal preemption.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES P. LINN
B.J. ROTHBAUM *
LINN & NEVILLE, P.C.
1200 Bank of Oklahoma Plaza
201 Robert S. Kerr Avenue
Oklahoma City, OK 73102-4289
(405) 239-6781
Attorneys for Respondents Midland Mortgage Co., Midfirst Bank S.S.B. and Northwest Bank

July 15, 1996

* Counsel of Record

(3)

FILED
AUG 12 1996
CLERK

No. 95-2009

In the Supreme Court of the United States

OCTOBER TERM, 1995

ROGER W. PIPKIN, III, PETITIONER

v.

MORTGAGE CREDITCORP, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE GOVERNMENT NATIONAL MORTGAGE ASSOCIATION IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
MARC RICHMAN
DAVID J. GOTTESMAN
Attorneys
Department of Justice
Washington, D. C. 20530
(202) 514-2217

16 pp

QUESTION PRESENTED

Petitioner is a default-judgment creditor of the issuer and former servicer of certain Texas real estate mortgages owned by the Government National Mortgage Association (GNMA) but recorded in the issuer's name. Before petitioner obtained his judgment, the issuer defaulted in its obligations to GNMA, which exercised its contractual right to have the issuer's formal interest in the mortgages immediately assigned to GNMA.

The question presented is whether petitioner may divest GNMA of ownership of those mortgages solely because GNMA did not record the mortgages' assignment in accordance with petitioner's interpretation of state law, where the National Housing Act, 12 U.S.C. 1721(g)(1), provides that the mortgages in such circumstances "shall become" GNMA's "absolute property" and that "[n]o State or local law * * * shall preclude or limit the exercise * * * [of GNMA's] ownership rights."

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	12

TABLE OF AUTHORITIES

Cases:

DRG Funding Corp. v. *Secretary of Housing and Urban Development*, Civ. A. No. 88-2202, 1988 WL 90107 (D.D.C. Aug. 12, 1988)	9
First State Bank of Amarillo v. *Jones*, 183 S.W. 874 (Tex. 1916)	9
Freightliner Corp. v. *Myrick*, 115 S. Ct. 1483 (1995)	10
Hines v. *Davidowitz*, 312 U.S. 52 (1941)	10
Morales v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992)	10
Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)	11
Sperry v. *Florida ex rel. Florida Bar*, 373 U.S. 379 (1963)	11
United States v. *Union Central Life Ins. Co.*, 368 U.S. 291 (1961)	11

Statutes:

National Housing Act, 12 U.S.C. 1701 *et seq.*:	
§ 301(5), 12 U.S.C. 1716(5)	2, 10
§ 301(c), 12 U.S.C. 1716(c) (1988)	10
§ 306(g), 12 U.S.C. 1721(g)	3, 4, 7, 9, 10
§ 306(g)(1), 12 U.S.C. 1721(g)(1)	2, 5, 7, 8, 9
§ 309(a), 12 U.S.C. 1723a(a)	9
Texas Prop. Code Ann. (West):	
§ 13.001 (1984 & Supp. 1996)	3
§ 13.001(a) (Supp. 1996)	7

Miscellaneous: Page

Jan S. Krasnowiecki, *et al.*, *The Kennedy Mortgage Co. Bankruptcy Case: New Light Shed on the Position of Mortgage Warehousing Banks*, 56 Am. Bankr. L.J. 325 (1982) 8

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-2009

ROGER W. PIPKIN, III, PETITIONER

v.

MORTGAGE CREDITCORP, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE GOVERNMENT NATIONAL MORTGAGE ASSOCIATION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is unpublished, but the judgment is noted at 72 F.3d 138 (Table). The district court opinion (Pet. App. 15a-20a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 1995. A petition for rehearing was denied on March 14, 1996 (Pet. App. 13a). The petition for a writ of certiorari was filed on June 12, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

12 U.S.C. 1721(g)(1) provides, in pertinent part:

> * * * The Association [GNMA] is hereby empowered, in connection with any guaranty under this subsection, whether before or after any default, to provide by contract with the issuer for the extinguishment, upon default by the issuer, of any redemption, equitable, legal, or other right, title, or interest of the issuer in any mortgage or mortgages constituting the trust or pool against which the guaranteed securities are issued; and with respect to any issue of guaranteed securities, in the event of default and pursuant otherwise to the terms of the contract, the mortgages that constitute such trust or pool shall become the absolute property of the Association subject only to the unsatisfied rights of the holders of the securities based on and backed by such trust or pool. No State or local law, and no Federal law (except Federal law enacted expressly in limitation of this subsection after October 8, 1980), shall preclude or limit the exercise by the Association of (A) its power to contract with the issuer on the terms stated in the preceding sentence, (B) its rights to enforce any such contract with the issuer, or (C) its ownership rights, as provided in the preceding sentence, in the mortgages constituting the trust or pool against which the guaranteed securities are issued. The full faith and credit of the United States is pledged to the payment of all amounts which may be required to be paid under any guaranty under this subsection. * * *

Texas Property Code Annotated § 13.001 (West 1984 & Supp. 1996) provides, in pertinent part:

> (a) A conveyance of real property or an interest in real property or a mortgage or deed of trust is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record as required by law.
>
> (b) The unrecorded instrument is binding on a party to the instrument, on the party's heirs, and on a subsequent purchaser who does not pay a valuable consideration or who has notice of the instrument.

* * * * *

STATEMENT

1. The Government National Mortgage Association (GNMA, popularly known as Ginnie Mae) is a government corporation within the Department of Housing and Urban Development. Under Section 306(g) of the National Housing Act, 12 U.S.C. 1721(g), GNMA operates a mortgage-backed securities program under which it authorizes private entities to issue securities backed by federally insured or guaranteed home mortgages. The securities are sold to the public, and the issuer uses the proceeds to make mortgage loans. Under this program, mortgage loans are made, for example, under the mortgage insurance program of the Federal Housing Administration (FHA) and the loan guarantee program of the Department of Veterans Affairs (VA). The program is designed to attract funds into the mortgage market, thereby making FHA and VA mortgages more

readily available and promoting the public policy of increasing home ownership opportunities. Pet. App. 3a-5a; C.A. App. 112-113.[1]

The issuer is responsible for servicing the securities and the mortgages backing them. That includes collecting payments from borrower-mortgagors and remitting principal and interest to the security holders. GNMA, backed by the full faith and credit of the United States, guarantees that the security holders will receive timely payment of principal and interest. Pet. App. 5a; 12 U.S.C. 1721(g). This guarantee makes the securities reliable investments, thus attracting money for mortgage loans. But it also exposes the federal government to substantial liability to the securities holders. Pet. App. 5a; C.A. App. 113-114.

The mortgages backing the securities are the government's fundamental protection against this potential liability. Accordingly, security issuers participating in this program must assign to GNMA all right, title, and interest in the mortgages. The issuer retains only nominal title, and records the mortgages in its name solely to assist it in servicing them. Pet. App. 5a; C.A. App. 114-116.

Section 1721(g) further authorizes GNMA to enter into contracts with each issuer to ensure that, if the issuer fails to meet its obligations, GNMA may declare a default and extinguish all right, title, and interest of the issuer in the mortgages, and thereby make the mortgages the "absolute property" of GNMA, subject "only" to the unsatisfied rights of the holders of the securities backed by the mortgages.

---

[1] "C.A. App." refers to the court of appeals appendix.

12 U.S.C. 1721(g)(1). Thus, Section 1721(g)(1) "empower[s]" GNMA

> to provide by contract with the issuer for the extinguishment, upon default by the issuer, of any * * * interest of the issuer in any mortgage or mortgages * * * against which the guaranteed securities are issued; and with respect to any issue of guaranteed securities, in the event of default and pursuant otherwise to the terms of the contract, the mortgages * * * shall become the absolute property of [GNMA], subject only to the unsatisfied rights of the holders of the securities * * *. No State or local law, and no federal law (except Federal law enacted expressly in limitation of this subsection after October 8, 1980), shall preclude or limit the exercise by [GNMA] of (A) its power to contract with the issuer on the terms stated in the preceding sentence, (B) its rights to enforce any such contract with the issuer, or (C) its ownership rights, as provided in the preceding sentence, in the mortgages * * *.

By the express terms of its contracts, GNMA may exercise its rights under this provision simply by issuing a letter of default to the issuer. Pet. App. 5a; C.A. App. 116-117, 136 (§ 7.04). GNMA then immediately takes over the responsibility of making the required payments to the security holders, and it relies upon the immediate and ongoing availability of the mortgages (and the income stream they generate) to help it make such payments. C.A. App. 118.

2. Respondents Mortgage Creditcorp, Inc. and Westmark Mortgage Corporation (collectively, the Westmark Parties) were issuers under the program until GNMA issued them letters of default. Those

letters expressly stated that all of the Westmark Parties' right, title, and interest in their mortgages were extinguished and that the mortgages were therefore the absolute property of GNMA, subject only to the unsatisfied rights of the securities holders. Pet. App. 5a; C.A. App. 117. Because GNMA has limited personnel and resources, it engaged the Midland Parties, consisting of respondent MidFirst Bank, S.S.B., assisted by respondents Midland Mortgage Company and Northwest Bank, to "subservice" the mortgages and securities on GNMA's behalf. C.A. App. 118-119.

3. In a lawsuit wholly unrelated to the mortgages or the program involved in this case, petitioner sued the Westmark Parties in a Texas state court, alleging that they had failed to deliver a lien-free house to him. C.A. App. 309. The Westmark Parties (which apparently were defunct at that time) did not appear or answer, and petitioner obtained a default judgment against them, consisting of $875,478 in actual damages, interest, and attorney's fees, as well as $4 million in punitive damages. Pet. App. 2a; C.A. App. 13-15. GNMA and the Midland Parties were not parties to that suit. C.A. App. 120, 170-171.

Petitioner learned that various mortgages were recorded in Texas under the names of the Westmark Parties. Believing that the Midland Parties (located in Oklahoma) held the mortgage instruments, he filed his default judgment in Oklahoma state court, and caused writs of execution to be served upon the Midland Parties. Pet. 3; Pet. App. 3a, 16a. GNMA, which was joined as a third-party defendant, removed the action to the United States District Court for the Western District of Oklahoma. Pet. App. 3a.

The defendants—GNMA and the Midland Parties—moved for summary judgment. They argued, among other things, that petitioner, as a judgment creditor of the Westmark Parties, could execute only on interests held by the Westmark Parties and that those parties had lost all right, title, and interest in the mortgages when GNMA declared them in default and the mortgages became, under Section 1721(g)(1), the absolute property of GNMA. Therefore, the defendants observed, the Westmark Parties held no interest in the mortgages upon which petitioner could execute.

Petitioner argued that, under Texas Property Code Annotated § 13.001(a) (West Supp. 1996), assignments to GNMA of mortgages on Texas real estate were void unless recorded in Texas property records. Pet. App. 18a. On this basis, petitioner contended that he was entitled to execute upon mortgages recorded under the Westmark Parties' names.

The district court entered summary judgment for the defendants, Pet. App. 15a-20a, holding that Section 1721(g)(1) preempted any state law that might otherwise require GNMA to record its interest in the mortgages.

4. In an unpublished decision, the court of appeals affirmed. It held that, even if the Texas statute applied as petitioner argued, it was preempted by Section 1721(g). The court reasoned that, through the plain language of Section 1721(g), Congress had "emphatically expressed its intent to preempt any state law" that would limit GNMA's rights to the mortgages, and that requiring GNMA to record its interest would impermissibly limit those rights. Pet. App. 7a. The court added that requiring GNMA to comply with Texas's recording statute would

frustrate the purposes underlying GNMA's enabling legislation. *Id.* at 7a-8a.

ARGUMENT

1. Section 1721(g)(1) provides that, "in the event of [an issuer's] default and pursuant otherwise to the terms of the contract" between GNMA and the issuer, the mortgages underlying the guaranteed securities in GNMA's mortgage-backed securities program "shall become the absolute property of [GNMA], subject only to the unsatisfied rights of the holders of the securities." By its terms, Section 1721(g)(1) expressly preempts, *inter alia*, any state law that would "limit the exercise" of GNMA's "ownership rights" in those mortgages. The Texas recording statute at issue (assuming that petitioner's interpretation of it is correct)[2] would, if applied here, obviously "limit the exercise" of GNMA's "ownership rights." It is therefore the kind of "state law" that Section 1721(g)(1) expressly preempts.

---

[2] Petitioner asserts that all other assignees of mortgages must record their interests in order to preserve them. Pet. 9-10. That appears to be incorrect as a matter of state law. Those who receive assignments of mortgages in the secondary mortgage market (*i.e.*, not only GNMA, but also entities that operate private-sector mortgage-backed securities programs) typically do not and need not record under state recording laws. See Jan S. Krasnowiecki, *et al.*, *The Kennedy Mortgage Co. Bankruptcy Case: New Light Shed on the Position of Mortgage Warehousing Banks*, 56 Am. Bankr. L.J. 325, 330, 332 (1982). "[T]he recording acts, if they apply at all, apply only as between the assignee or other claimant in the mortgage and the owner of the underlying land or those who claim through him; they do not apply as between competing assignees or successive claimants *in the mortgage*." *Id.* at 336; see also Br. in Opp. for Midland Mortgage Co., *et al.*, at 8-12.

Petitioner argues that Section 1721(g)(1) deals only with GNMA's rights against an issuer, "not GNMA's rights against any third party." Pet. 9.[3] That argument is without merit. On its face, Section 1721(g)(1) broadly preempts—in any context, with one well-defined exception—any state law that threatens to impair the "ownership rights" that GNMA is entitled to assume "in the event of default." The *only* parties against whom GNMA may not assert its "absolute" ownership rights in those circumstances are "the holders of securities" with prior, unsatisfied rights. 12 U.S.C. 1721(g)(1). Because the statute specifies this narrow category of third parties against whom GNMA may not assert its otherwise "absolute" ownership rights, it forecloses, by necessary implication, any claims of other third parties, such as creditors of the issuer. See also 12 U.S.C. 1723a(a) ("no attachment, injunction, or other similar process, mesne or final, shall be issued against the property of [GNMA] or against [GNMA] with respect to its property").[4]

---

[3] For this proposition, petitioner relies (Pet. 9) on an unpublished district court decision, *DRG Funding Corp.* v. *Secretary of Housing and Urban Development*, Civ. A. No. 88-2202, 1988 WL 90107 (D.D.C. Aug. 12, 1988), that is not on point. *DRG Funding* addresses whether an issuer may challenge GNMA's actions in federal district court. That is why the language quoted by petitioner refers only to GNMA's rights as against issuers.

[4] In any event, as a judgment creditor of the issuers (the Westmark Parties), petitioner can execute only on whatever interest the issuers have in the mortgages. *First State Bank of Amarillo* v. *Jones*, 183 S.W. 874, 876 (Tex. 1916). Here, because Section 1721(g) and the contracts formed pursuant to that provision have extinguished the Westmark Parties' interest in the mortgages, the Westmark Parties have no

2. Even if the Texas recording statute did not fall plainly within the scope of Section 1721(g)'s express preemption provision,[5] it would still be preempted because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Freightliner Corp.* v. *Myrick*, 115 S. Ct. 1483, 1487 (1995), quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Specifically, if a recording requirement could strip GNMA of its ownership interest in the mortgages, then, as the court of appeals correctly observed, "the outstanding securities guaranteed by GNMA would no longer be 'based on and backed by' the mortgages," and "the government would be forced to pay the investors out of general Treasury funds." Pet. App. 8a; see generally 12 U.S.C. 1716(5) (formerly designated as 12 U.S.C. 1716(c) (1988)) (declaring Congress's intent that GNMA's operations be conducted with "minimum loss to the Federal Government").

Petitioner argues that application of the Texas recording statute would not frustrate the statutory scheme because GNMA *could* have recorded its interest and, in theory, avoided a conflict with peti-

---

property or other interest upon which petitioner may execute. Thus, even if Section 1721(g) were limited to an issuer's rights in the mortgages, once those rights are extinguished, the issuer's judgment creditors (who stand in the issuer's shoes) can have no better claim to the mortgages than the issuer itself.

[5] Petitioner suggests (Pet. 6-7) that preemption arises only where it is impossible to comply with both state and federal requirements. That is incorrect. Where, as here, a state law falls within the scope of an express preemption provision, it is preempted whether or not it is inconsistent with substantive federal requirements. See *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 386 (1992).

tioner's reading of state law. But, as the court of appeals observed (Pet. App. 8a), and as this Court has repeatedly held, a State may not impose burdens on federally sponsored programs or activities beyond the requirements of federal law. See *Sperry* v. *Florida ex rel. Florida Bar*, 373 U.S. 379, 385 (1963); *United States* v. *Union Central Life Ins. Co.*, 368 U.S. 291, 296 (1961); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 235-236 (1947) (federally licensed warehouseman "could not be required by a State to do more or additional things * * * even though they in no way conflicted with what was demanded of him under the Federal Act"). In any event, GNMA presented undisputed evidence below that compliance with the myriad of state and local recording laws would, in fact, impair the efficient operation of GNMA's nationwide mortgage-backed securities program. See C.A. App. 119 (declaration of GNMA official George Anderson).[6]

---

[6] Petitioner suggests several circumstances, far removed from the facts of this case, in which (according to petitioner) it would be reasonable to compel the federal government to follow state real property law. See Pet. 10. Any preemption issues raised by those hypothetical scenarios should be addressed if and when they ever actually arise.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
MARC RICHMAN
DAVID J. GOTTESMAN
Attorneys

AUGUST 1996